KOW KEK LEONG

v.

KL TEAM DEVELOPMENT SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
ABDUL WAHAB PATAIL J
[COMPANIES WINDING-UP NO: 28-59-96]
26 NOVEMBER 1997

COMPANY LAW: *Directors - Removal - Removal pursuant extraordinary general meeting - Requirement for special notice - Companies Act 1965, ss. 128(2) & 153*

COMPANY LAW: *Winding-up - Oppression - Just and equitable rule - Whether directors acting in own interests - Companies Act 1965, ss. 181, 218(1)(f) & (i)*

The petitioner and the 2nd, 3rd and 4th respondents were the equal shareholders and directors of the first respondent ('the company'), which is essentially a quasi partnership company. The 5th respondent was a director of the company. The company had undertaken a project called "Pangsapuri Sri Bandar" which it had completed and handed over to a certain management company. The petitioner was unhappy with the way the other directors had prepared and managed the company's accounts and had queried over the same in the general meetings of the company. No response or cooperation, however, was accorded to the petitioner in respect of the queries. Instead, at the extraordinary general meeting of the company held on 18 December 1995, a resolution was passed by the 2nd, 3rd and 5th respondents removing the petitioner from the directorship of the company. And, having so removed the petitioner, the remaining directors thereafter convened a meeting of the board of directors and increased the payment of the director's fee to themselves.

Being dissatisfied, the petitioner petitioned to wind up the company under ss. 181 and 218(1)(f) or (i) of the Companies Act 1965 ('the Act') and, amongst others, applied for declarations (i) that the extraordinary general meeting of 18 December 1995 and the resolution passed therein did not comply with s. 128 of the Act, and was therefore null and void; (ii) that the director's salary, allowance and bonus paid or advanced since the year 1996 were unlawful and be restored to the account of the company. It was not in dispute that, in convening the extraordinary general meeting aforesaid, no special notice as required by s. 128(2) of the Act was accorded to the petitioner, and nor was he given a 14-day notice stipulated for in art. 45 of the company's articles of association. The issue before the court was whether the circumstances and facts herein were such as to justify the grant of the winding-up order as applied for by the petitioner.

Held:

[1] There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect before a case of oppression could be made out. Similarly "disregard" involved something more than a failure to take account of the minority's interest; there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure.

[2] The powers, right and responsibilities of a person as a shareholder, director and as a member of the board of directors is separate and independent of each other. The management, including the accounts, of the company is the collective responsibility of the board of directors. Every director therefore has a right to demand a copy of the accounts before it is sent to the auditors since ultimately he is party to the accounts. And, at the annual general meeting, he is entitled to receive a copy of the audited accounts as a shareholder notwithstanding that as a director he already has a copy and is a party to the said accounts.

[3] Merely because the majority shareholders disagreed with or ignored the complaints of the petitioner and made a resolution to approve the accounts is not "oppression" or "disregard" as to attract the operation of s. 181 of the Act. A majority, not consensus, carries the decisions of the board of directors. Under s. 181 of the Act there must be something more.

[4] On the question of the director's allowance, on the facts, the affairs of the company were conducted or the powers of the directors were exercised in a manner oppressive to the petitioner. That being so the petition to wind up the company under s. 181 of the Act ought to be allowed. The facts also showed that there had been a breakdown of essential mutual confidence between the petitioner and the other shareholders. In the circumstances, it is also just and equitable to wind-up the company under s. 218 of the Act.

[5] Section 128(2) of the Act overides art. 45 of the articles of association of the company in respect of the notice period for the removal of a director of the company. As the notice given to the petitioner did not comply with s. 153 of the Act it was bad. Where a meeting is held pursuant to a bad notice, the meeting is void, and resolutions passed thereat is null and void.

[Petition allowed.]

Case(s) referred to:

Bentley-Stevens v. Jones & Ors [1974] 2 All ER 653 ***(cit)***

Dato' HM Shah & Ors v. Dato' Abdullah Ahmad [1991] 1 CLJ 238 ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 ***(cit)***

Re Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beg Sung [1978] 2 MLJ 227 ***(cit)***

Re Senson Auto Supplies Sdn Bhd [1988] 1 MLJ 326 ***(refd)***

Solaiappan & Ors v. Lim Yoke Fan & Ors [1968] 2 MLJ 21 ***(cit)***

Tuan Haji Ishak Ismail & Ors v. Leong Hup Holdings Bhd & Ors Appeals [1996] 1 CLJ 393 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 128(2), 153, 181(1)(a), 218(1)(f)(i)

For the petition - Lee Chan Leong; M/s Ching Tan & Partners
For the respondents - KG Tan; M/s Tee, Tan & Partners

Reported by Ling Hea Hoon

JUDGMENT

Abdul Wahab Patail J:

The Background

The first respondent is a private registered company incorporated on 18 October 1991 (the company), limited by shares, all of which have been issued and fully paid up. The petitioner is an equal shareholder along with the second, the third and fourth respondents. Indeed, the four of them were subscribers in the memorandum of the company. In the beginning they were all directors of the company. The fifth respondent is a director of the company.

The company undertook a 144 unit condominium project called "Pangsapuri Sri Bandar" (the condominium project). By 1 December 1995, the condominium project has been completed and its management has been handed over to the management company "Pangsapuri SB Management Company Sdn Bhd" (the management company).

By this petition, the petitioner is applying for the Winding-up of the company under s. 181 and/or s. 218(1)(f) or (i) of the Companies Act 1965 and, amongst other orders, declarations that the extraordinary general meeting of 18 December 1995 and/or the resolution removing the petitioner as a director on the same date, as being null and void and of no legal effect whatsoever, and that all or any director's salary, allowance and bonus paid or advanced since the year 1996 are unlawful and to be restored to the account of the company. The prayers are as follows:

a) An injunction be granted against all the respondents and each and everyone of the respondents restraining them and any one or more of them or their agent or servant from drawing, taking or paying from the account or cash in hand of the first respondent company or in whatsoever manner causing the fund or assets of the first respondent company be reduced or dissipidated unless with the approval of the petitioner or his solicitors or any person/body deems fit by this Honourable Court;

b) A provisional liquidator be appointed to manage the first respondent company until further order from this Honourable Court;

c) An order directing a detail account to be prepared by the respondents or any one or more of them who appears to be responsible in respect of the financial affair of the first respondent company for financial year ended on 31 December 1991 and subsequent years until 1995 for the inspection of the petitioner and/or his agent or servant;

d) An order directing a detail account to be prepared by the respondents or anyone or more of them who appears to be responsible in respect of the "Pangsapuri Sri Bandar" project for the inspection of the petitioner and/or his servant or agent;

e) An order declaring that the extraordinary general meeting held on 18 December 1995 and/or the resolution passed on 18 December 1995 removing the petitioner as director as null and void and of no legal effect whatsoever;

f) An order declaring that all or any directors salary, allowance and bonus paid or advanced since the year of 1996 as unlawful and that the amount paid or advanced be restored to the account of the first respondent company or be accounted for during final account taken upon winding up of the first respondent company:

g) An order directing that the first respondent company be wound up under s. 181 and/or s. 218(i)(f) or (i) of the Companies Act 1965 as the case may be;

h) Costs of this petition be provided for in a manner as this Hononable Court deems fit;

i) Such further or other consequential or incidental order as this Honounable Court deems fit.

a The petitioner argued that the relationship between the parties were of a quasi-partnership nature. Apart from the company, they had similar arrangements in five other companies, namely, *Macro Goldfin Sdn Bhd, Ehsan Aktif (M) Sdn Bhd, KL Team Properties Management Sdn Bhd, KL Team Realty Sdn Bhd, KL Team Equities Sdn Bhd*. Some time in the later part of 1995, the b petitioner became unhappy with the other shareholders. According to the petitioner, the second respondent as the managing director of the company had failed to provide the directors with a set of financial accounts for their approval before the same was forwarded to the external auditor for auditing, the late tabling of the audited accounts for the financial year ending 31 December c 1993, and the quantum of salary paid to the directors of the company. The petitioner at the second annual general meeting of the company on 9 October 1995 raised these concerns. The audited accounts for the year ending 1993 was nevertheless approved by the second, third and fifth respondents while the fourth respondent abstained. On that occasion the second respondent informed the members of the company that prior approval of the directors is d not necessary before the unaudited accounts are sent to the auditor who will then report back to the members.

The third general meeting of the company was convened on 31 October 1995. The petitioner attended the meeting but abstained from voting on the grounds e that his query on the details of directors salary amounting to $71,800 for the year ending 31 December 1994 was not answered. The accounts was nevertheless approved by the second, third, fourth and fifth respondents. The petitioner subsequently requisitioned an extraordinary general meeting of the company which was then held on 4 December 1995 raising questions as to f the amount of $662,502 as owing to director, amount of $145,689 owing by other debtors and deposits, and land and development expenditure amounting to $5,268,273. At that meeting the petitioner pointed out the error that the projected profit was $2.7 million when it should have been $4.0 million. The petitioner was seeking clarification on the amount paid to each director.

g With the vote of three to two in support of a motion by the fifth respondent to remove the petitioner as a director, an extraordinary general meeting of the company was scheduled to be held on 18 December 1995 with notice issued the same day, 4 December 1995. By a letter dated 14 December 1995, the petitioner objected to the meeting of 18 December 1995 as being null and h void for noncompliance with s. 128 of the Companies Act. The meeting was proceeded with, with the attendance of the second, third and fifth respondents who then passed the resolution.

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Having passed the said resolution, the second, third and fifth respondents proceeded to convene a meeting of the board of directors by mutual consent, and unanimously approved the payment of director's fees to the second, third, fourth and fifth respondents at $12,000, $10,000, $10,000 and $3,500 per month respectively for the year 1996. On an annual basis that would amount to $426,000.

It was argued that since the condominium was the only project undertaken by the first respondent company, and such project had been completed by 1 December 1995 and handed over to the management company, the very large amount of directors fees was arbitrary and cannot be justified, and is an attempt to dissipate the assets of the company in blatant disregard of petitioner's interest as a shareholder of the company.

The Law

The petitioner has made a double-barreled approach of applying for the Winding-up under ss. 181 and 218 of the Companies Act. These sections briefly are as follows:

Section 181

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the court for an order under this section on the ground -

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

…

(3) Where an order that the company be wound up is made pursuant to subsection (2) (e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: [One thousand ringgit.] default penalty.

Section 218

218(1) of our Act provides that the court may order the winding up if:

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;

...

(i) the Court is of opinion that it is just and equitable that the company be wound up.

In this case we have a fact pattern where the appellant's directorship of the company had been terminated. The company has four equal shareholders, all of whom are directors of the company. More tellingly, they were the original subscribers to the memorandum of the company. The only project undertaken by the company is this condominium project. Other projects undertaken by these shareholders are organised and carried out by companies separately incorporated for the purpose, with or without other parties. In context therefore we see a pattern where the company is essentially a quasi-partnership. But, when the petitioner questioned on matters relating to the accounts of the company, there was lack of cooperation. Instead he was removed as a director of the company.

The Privy Council had occasion to consider s. 181 of the Companies Act in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beg Sung* [1978] 2 MLJ 227. It was held that for the case to be brought within s. 181(1)(a) of the Companies Act 1965 at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possessed a majority of the voting power and, in reliance upon that power, made policy or executive decisions,

with which the complainant did not agree, was not enough. There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder was entitled to expect before a case of oppression could be made out. Similarly "disregard" involved something more than a failure to take account of the minority's interest; there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure. The question whether there is oppression, disregard, unfair discrimination or whether the act complained of is prejudicial is one that must be determined according to the facts of each particular case; *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 applied in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113 FC.

It was not disputed that the petitioner had questioned as to the late preparation of the accounts, and that it was sent to the auditors of the company before being tabled to the directors. I would pause briefly here to say that the powers, rights and responsibilities of a person as a shareholder, director and as a member of the board of directors is separate and independent of each other. The management, including the accounts, of the company is the collective responsibility of the board of directors. It is the board of directors of the company who submits the accounts of the company to the auditors, whose function and responsibility is to independently verify and to certify that the accounts of the company has been prepared properly and reflects the true state of the financial affairs of the company. After the accounts have been audited, is the board of directors who submits the audited, and therefore independently verified, accounts to shareholders at the annual general meeting of the company. Every director therefore has a right to demand a copy of the accounts before it is sent to the auditors since ultimately he is party to the accounts. At the annual general meeting he is entitled to receive a copy of the audited accounts as a shareholder notwithstanding the fact that as a director he has a copy and is a party to the said accounts.

Having said that, merely because the majority shareholders disagreed with or ignored the complaints of the petitioner and made a resolution to approve the accounts is not "oppression" or "disregard" as to attract the operation of s. 181. A majority, not consensus, carries the decisions of the board of directors. Under s. 181 there must be something more.

Then comes the question of director's allowances. The petitioner was asked to write in with regard to the question of director's allowances. After his dismissal as a director there was a sudden and major increase in the allowances being paid. The allegations by the petitioner were not denied. The respondents' case is that there was a majority decision authorising it. Also not denied is the allegation the project was already completed and handed over to the

management company. The respondents' answer to the petition is that the company should not be wound up because it had to continue to exist to complete matters relating to the issue of titles to the purchasers of the condominium units.

What the respondents' have failed to answer is why when the main part of the work of the company has been completed, then only are the directors paid substantial sums as fees. There is no clear indication when the final formalities such as issue of certificates of title to purchasers will be completed, accounts finalised, and the profits distributed. The fees were of such a scale that there would be a substantial reduction in the eventual profit of the company. The fact remains, when the final accounts are prepared, that there is little profit if any to share in for the petitioner who does not receive any of the director's allowances in the meantime. Considered within the context of the fact the company is a single project company, and their quasi-partnership natures with all the four shareholders originally as subscribers and directors, there are sufficient grounds for deep concern.

The second respondent was cross-examined in court. His answers to questions put to him were combative and uncooperative. To some extent this is reflected in the record. He does not strike me as a person ignorant of the consequences of his action. This court finds specifically that the petitioner has proven beyond a balance of probabilities that the respondents have no reason to pay themselves directors' allowances of such magnitude. They are aware of the interest of the petitioner, and there is an evident decision to override it or brush it aside or to set at naught by passing a resolution to pay themselves generous fees. Indeed, his approach is disarmingly simple: the majority had decided by resolution. No concern has been expressed at any time for the petitioners' position. I find that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to the petitioner. In these circumstances I would allow the order under s. 181 to wind-up the company.

Furthermore given the above facts, s. 218 would even more clearly apply. In *Tuan Haji Ishak bin Ismail & Ors v. Leong Hup Holdings Bhd and other appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661 CA the court considered s. 218. Mahadev Shankar JCA, delivering the judgment of the Court of Appeal held that:

> The words in (f) are somewhat different, but the effect is very similar if not the same. Self-interest, unfair or unjust conduct could also amount to oppression, unfair discrimination or conduct which is unfairly prejudicial to minority interests.
>
> ... When mutual confidence breaks down between partners, the remedy under s. 218(f) is to wind up because it is just, equitable so to do.

I am certain in my mind that there has been a breakdown of essential mutual confidence between the petitioner and the other shareholders, and in the circumstances it is just and equitable to wind-up the company. The issue of certificates of title to buyers of the condominiums will not be impossible, as the liquidators can deal with it.

In *Tuan Haji Ishak bin Ismail & Ors v. Leong Hup Holdings Bhd and other appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661 CA, it was stressed, following *Bentley-Stevens v. Jones & Ors* [1974] 2 All ER 653; *Solaiappan v. Lim Yoke Fan & Ors* [1968] 2 MLJ 21; and *Dato' HM Shah & Ors v. Dato' Abdullah bin Ahmad* [1991] 1 CLJ 238; [1991] 1 MLJ 91 that the right to appoint and remove directors is statutory and the courts are loath to interfere with a statutory right. The petitioner says that he has not been given special notice under s. 128(2) with 28 days notice under s. 153; nor 14 days notice under art. 45 of the company's articles of association, and the meeting was further invalid because of the attendance of the 5th respondent who is not a shareholder.

The 5th respondent's attendance at the shareholder's meeting did not invalidate the meeting, as he is a director of the company. In *Dato' HM Shah & Ors v. Dato' Abdullah bin Ahmad* [1991] 1 CLJ 238; [1991] 1 MLJ 91 the Supreme Court held that s. 128 of the Companies Act 1965 provides for removal of a director of a public company by ordinary resolution notwithstanding anything in the company's memorandum or in any agreement between the company and the director. That being so, I hold that s. 128(2) overrides art. 45 of the articles of association.

The notice therefore, not complying with s. 153 is bad. Where a meeting is held pursuant to a bad notice, the meeting is void, and resolutions passed thereat is null and void: *Solaiappan & Ors v. Lim Yoke Fan & Ors* [1968] 2 MLJ 21 FC.

Orders are hereby granted as prayed, with the amendment in respect of prayer c) and d) that the accounts be given to the liquidator.